

ALLEN & OVERY

Client Alert – September 2017

Thailand renewables update: ALRO land – new Order and Applications

Speed read

Please find below our latest update about the legality of using ALRO land for the development of wind and other energy power projects in Thailand following issue of the recent NCPO Order. The Order requires existing projects to make an Application to ALRO within 60 days of the issue of ministerial regulations.

We understand that the new ministerial regulations are still under discussion within the government. It will be important for companies which use Sor Por Kor land to monitor and be ready to act once the regulations are published. Once published, there will be only 60 days to assess whether you need to apply, and then to prepare and submit an Application to ALRO.

BACKGROUND

By way of background, since the Agricultural Land Reform Act B.E. 2518 (1975), certain agricultural land in Thailand has been designated as **Sor Por Kor land** and is intended to be used only for farming purposes in order to support farmers in the Kingdom. The Agricultural Land Reform Office (**ALRO**) is the relevant government authority designated to supervise the occupation of such agricultural land.

Concerns emerged with respect to the development of wind farm projects on Sor Por Kor land following a Supreme Administrative Court ruling on 26 August 2016 which held that Thepsathit Wind Farm Co., Ltd. (**Thepsathit**), whose project is located on agricultural land, misused the land by developing a wind farm business (as opposed to using the land for its intended farming purpose). As part of its judgment, the Supreme Administrative Court suspended the permission of Thepsathit to develop its project.

RECENT UPDATE (AS AT 31 JULY)

The government has now amended the law to enable ALRO to approve the use of Sor Por Kor land for purposes in addition to the purposes set out in the Land Reform Act (under which only farmers are allowed to use the Sor Por Kor lands for agricultural purposes). Now, use is permitted to the extent necessary and where intended to benefit the energy sector, the use of natural resources or the public interests.

The amendment was made by means of the attached order pursuant to Section 44 of the interim Constitution (2015) in conjunction with Section 265 of the Constitution (2017)

which was published in the *Royal Gazette* on 23 June 2017 and became effective on the same day (the **Order**).

Article 44 empowers the Head of the National Council for Peace and Order (**NCPO**), ie the Prime Minister, with the approval of the NCPO to order, restrain, or perform any act with legislative, executive, or judicial effect (effectively passing laws which bypass the legislative, executive and judiciary). The Constitution (2017) permits continued use of Section 44 until the next elected government comes to power in Thailand.

The Order provides a clear legal basis for ALRO to grant land leases to wind farms and other renewable energy projects, but the detail of the Order is still to be set out in ministerial regulations. The Order requires the Ministry of Agriculture and Cooperatives to issue new regulations to replace the existing regulations within 90 days (which would be 21 September 2017, although it is not unusual for departments to issue regulations later than planned).

The Order requires certain users of Sor Por Kor land to make an application to ALRO (an **Application**) and the new regulations are to specify:

- the criteria stating which users of Sor Por Kor land will be obliged to make an Application;
- the criteria stating which Applications to ALRO will additionally require Cabinet approval (possibly linked to the size and type of user e.g. small projects could be exempted); and
- the process and conditions for the Applications.

The Order also provides that those who were already permitted to use Sor Por Kor land to operate under the previous ALRO rules¹ before this Order has become effective may seek an extension of their land use rights by submitting an Application within 60 days from the date such ministerial regulations are issued and may continue using the land while waiting for the result.

It is not clear from the Order what the consequences of being late or failing to apply would be – however pending further detail we would expect that:

- any existing project which is permitted to use Sor Por Kor land to operate under the previous ALRO rules but has not yet submitted an Application within the 60 day window would be open to challenge in the courts; and
- any existing project company which had made undertakings to lenders to obtain and maintain all necessary permits could be in breach of the undertakings by failing to apply within the 60 day window and may be obliged to notify such lenders.

The Order confirms ALRO's previous practice of collecting fees from renewable energy projects or other Sor Por Kor land users for the Agricultural Land Reform Fund for the benefit of farmers as well as rent for the use of the Sor Por Kor land.

Please refer to the Thai language copy of the Order: [Order of the Head of the National Council for Peace and Order \(NCPO\) No. 31/2560 \(2017\) Re: the Utilisation of Agricultural Land under the Laws on Agricultural Land Reform for the Utmost Benefits on Farmers and Public Interests.](#)

Note: The judgment in the Thepsathit case is not yet available on the court website. While Supreme Administrative Court cases are made publicly available, this is likely because the judgment has not yet been completed and made public.

¹ The previous rules under which ALRO granted leases to non-farming businesses (being principally oil fields, mining or wind farms) were the ALRO Rules Re: the Approval on the Use of Natural Resources in the Agricultural Land Reform Area for Other Purposes B.E. 2541 (1998) or the ALRO Rules Re: the Criteria, Process and Conditions for the Approval and the Guidelines for the Use of Land or Immovable Properties for Businesses that Promote or are Related to Agricultural Land Reform B.E. 2541 (1998).

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